A **BATU KEMAS INDUSTRI SDN BHD v. KERAJAAN MALAYSIA & ANOR**

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
VERNON ONG LAM KIAT JCA
B ABDUL RAHMAN SEBLI JCA
[CIVIL APPEAL NO: A-01-16-01-2013]
2 JULY 2015

C ***TORT:*** *Negligence – Damages – Claim for – Contract for electricity supply between second defendant and plaintiff – Jabatan Kerja Raya embarked on constructing works and struck underground cable connected to plaintiff's factory – Interruption of supply of electricity to plaintiff's factory causing loss and damages – Whether damage foreseeable – Duty of care – Whether first defendant owed delegable duty of care – Government Proceedings Act 1956, s. 7(2), (3) – Whether cause of damage* D *due to surge or under voltage – Evaluation of competing views from expert witnesses – Whether there was absolute contributory negligence on plaintiff's part – Whether second defendant under contractual obligation to ensure continuous and uninterrupted supply of electricity*

E ***UTILITIES:*** *Electricity – Supply of – Contract for electricity supply between second defendant and plaintiff – Negligence – Claim for damages – Jabatan Kerja Raya embarked on constructing works and struck underground cable connected to plaintiff's factory – Interruption of supply of electricity to plaintiff's factory causing loss and damages – Whether damage foreseeable – Duty of care – Whether first defendant owed delegable duty of care – Government Proceedings Act 1956, s. 7(2),* F *(3) – Whether cause of damage due to surge or under voltage – Evaluation of competing views from expert witnesses – Whether there was absolute contributory negligence on plaintiff's part – Whether second defendant under contractual obligation to ensure continuous and uninterrupted supply of electricity*

G The plaintiff was operating a factory producing calcium silicate bricks. Pursuant to a supply of electricity contract ('the supply contract'), the second defendant Tenaga Nasional Berhad supplied electricity to the plaintiff. Prior to the supply contract, as required by the second defendant, the plaintiff constructed a power substation housing the plaintiff's switch gear and relay systems, which functioned as a protection system against internal fault. H Jabatan Kerja Raya ('JKR'), under the control of the first defendant, embarked on constructing a rest and recreation area ('the project') on the Ipoh - Kuala Lumpur Highway ('the project site'). The first defendant had appointed Markas Perdana Sdn Bhd ('the contractor') to execute the project works. The contractor, whilst carrying out the project works at the project I site struck an underground cable ('the cable') belonging to the second defendant ('the incident') which was connected to the plaintiff's factory *via* a switching station. The cable was damaged, interrupting the supply of electricity to the plaintiff's factory. Consequently, the operations in the

plaintiff's factory ceased and the plaintiff's equipment were damaged ('the damage'). The plaintiff claimed damages against the first and second defendants for negligence and for breach of contract against the second defendant. The High Court dismissed the plaintiff's claim on three main grounds (i) there was no evidence from the plaintiff to show that there was a protective scheme set up to protect the machines; (ii) there was no duty of care and breach of duty on the part of the second defendant; and (iii) even if there was such a duty and breach of duty on the part of the second defendant, the plaintiff's contributory negligence was absolute. Hence, the plaintiff appealed. The plaintiff submitted that there were misdirections on the part of the Judicial Commissioner ('JC'), namely (i) that the JC had only looked at one aspect of the case *ie*, the alleged non-installation of the protective system by the plaintiff; (ii) that the JC found that the plaintiff's absolute contributory negligence served as a complete defence to the defendants; (iii) that the JC had failed to consider the defendants' duty of care and breach of the same; and (iv) that the JC had failed to consider the plaintiff's cause of action under breach of contract in relation to the second defendant.

Held (allowing appeal with costs)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) The JC failed to consider whether the defendants owed the plaintiff a duty of care. It was quite settled that apart from the element of the foreseeability of damage, it is also necessary to consider the question of 'proximity' or 'neighbourhood' between the parties, and the question of whether it was fair, just and reasonable to impose a duty of care in the circumstances. The damage herein was foreseeable. The fact that the first defendant had control over the supervision of the project works was confirmed by the first defendant's witness who said that JKR was the sole party responsible for the supervision of the project works. (paras 19 & 20)

(2) The first defendant owed a non-delegable duty of care to ensure that the project works done would not injure third parties. In the discharge of that duty, the first defendant was obliged to take all necessary precautions; in the context of the present case, to obtain sufficient information on the project site and the potential hazards such as the existence of underground cables. Further, sub-s. 7(2) and (3) of the Government Proceedings Act 1956 allow for a claim to be brought against the first defendant for negligence. (para 22)

(3) Under the supply contract, the plaintiff was reliant on the second defendant for a consistent supply of electricity to its factory for the purposes of manufacturing bricks. The second defendant must have possession of information of the position of all its electrical cables, underground and aboveground within a particular area, including the project site. The second defendant had been notified by JKR that the

project works would be carried out on the project site. In fact, three letters dated 31 October 1997, 9 January 1998 and 27 February 1998 respectively were sent by JKR to the second defendant asking them to remove and/or to relocate the electrical cable and/or poles in the vicinity of the project site. There was no evidence to indicate whether the second defendant took any action to comply with JKR's requests. Accordingly, it was reasonably foreseeable that the project works could cause damage to the cables belonging to the second defendant and that any corresponding damage flowing therefrom was also reasonably foreseeable. (para 23)

(4) As to whether the cause of the damage to the plaintiff's equipment was due to a surge or an under-voltage was a matter of serious contention between the plaintiff and the second defendant. The plaintiff's expert witnesses, PW4 and PW8, was of the opinion that a surge occurred due to a severe voltage transient caused by a momentary shorting that in turn caused the fuses at the substation to have exploded. The second defendant's expert witnesses (DW5 and DW7) opined that the damage to the plaintiff's equipment was caused by under-voltage where high current flowed to the machineries and damaged the equipment. Had the JC evaluated the competing views, Her Ladyship would have found there to be reason to discount the opinion of DW5. Firstly, PW8 explained why the incident could not have resulted in an under voltage; this event was not explained by DW5. Further, the basis of DW5's opinion was doubtful by reference to his methodology and the fact of the fuse carrier being 'terbakar hangus' was not adequately explained even though challenged. The plaintiff's expert views did not shift under cross-examination, nor were their views discredited. Thus, the views of the plaintiff's experts ought to have been accepted. (paras 48-50)

(5) The plaintiff had protective measures installed for protection against under-voltage. The plaintiff had installed a relay system as well as the thermal overload on the equipment. Even though the protection measures were in place, the plaintiff's equipment was damaged by the incident. This clearly undercut the second defendant's contention that the incident caused an under-voltage. The cause of the incident was clearly a surge. Consumers could not be expected to protect against invasion of high voltage and are not required to put a surge arrestor at every equipment. The responsibility to devise a protection lay with the source of the over-voltage surge, in this case, the owner of the transformer, the second defendant. The damage could have been avoided if the second defendant had installed a surge arrestor at the terminals of the distribution transformers to arrest the surge at its source. The plaintiff had in place a protective system to protect against under-voltage which was a mandatory requirement. As such, the question of whether there was contributory negligence on the plaintiff's part did not arise. (paras 51 -52)

(6) Apart from the second defendant's failure to act on the three letters from the first defendant for the removal of the cables in the Project Site, it was evident that the second defendant also failed to maintain a visible cable marker. The only marker according to DW2 was a slab marker that was underground and it was to protect the cable; that if piling work was carried out, the workers would not know that there was a slab marker in that area. As such, the second defendant ought to have informed the JKR of the position of the cable without any specific request (*Lembaga Letrik Negara Malaysia v. Ramakrishnan*). (para 55)

(7) The second defendant was under a contractual obligation to ensure a continuous and uninterrupted supply of electricity to the plaintiff under the supply contract. The knowledge of the location of the cable must have been in the second defendant's possession. The second defendant did not inform the first defendant of the location of the cables at the project site. As the principal supplier of electricity, the second defendant ought to have acted diligently in response to the first defendant's letters. The failure to provide the details of the cable to the first defendant was not only negligent; it was an irresponsible act of omission. The second defendant had also failed to put in place a protection scheme to protect their users against surge. Had there been a surge protection scheme being put in place, it was probable that damage would not have been caused to the plaintiff's equipment. (paras 57-59)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif menjalankan operasi sebuah kilang yang menghasilkan batu bata kalsium silikat. Menurut kontrak bekalan elektrik ('kontrak bekalan'), defendan kedua, Tenaga Nasional Berhad membekalkan elektrik kepada plaintif. Sebelum kontrak bekalan itu, seperti yang dikehendaki oleh defendan kedua, plaintif membina sebuah pencawang kuasa yang menempatkan suis gear dan sistem geganti plaintif, yang berfungsi sebagai sistem perlindungan terhadap kesalahan dalaman. Jabatan Kerja Raya ('JKR'), di bawah kawalan defendan pertama, memulakan pembinaan sebuah kawasan rehat ('projek') di Lebuhraya Ipoh-Kuala Lumpur ('tapak projek'). Defendan pertama telah melantik Markas Perdana Sdn Bhd ('kontraktor') untuk melaksanakan kerja-kerja projek. Kontrakor tersebut, semasa melaksanakan kerja-kerja projek di tapak projek itu, telah melanggar kabel bawah tanah ('kabel') yang dimiliki oleh defendan kedua melalui stesen pensuisan. Akibatnya kabel itu rosak, dan mengganggu bekalan elektrik ke kilang plaintif. Dengan itu, operasi di kilang plaintif terpaksa dihentikan dan peralatan plaintif mengalami kerosakan ('kerosakan'). Plaintif menuntut ganti rugi daripada defendan pertama dan kedua untuk kecuaian dan bagi pelanggaran kontrak terhadap defendan kedua. Mahkamah Tinggi menolak tuntutan plaintif atas tiga alasan (i) tiada keterangan daripada plaintif untuk menunjukkan bahawa terdapat skim perlindungan yang didirikan untuk melindungi peralatan; (ii) defendan kedua tidak mempunyai kewajipan

berhati-hati dan tidak melanggar kontrak; dan (iii) walaupun terdapat apa-apa kewajipan dan pelanggaran kewajipan tersebut oleh pihak defendan kedua, kecuaian bersama plaintif adalah mutlak. Oleh itu, plaintif merayu. Plaintif menghujahkan bahawa Pesuruhjaya Kehakiman ('PK') telah tersalah arah kerana (i) PK telah hanya melihat satu aspek kes iaitu dakwaan bahawa plaintif telah gagal memasang sistem perlindungan; (ii) PK mendapati kecuaian bersama plaintif adalah pembelaan yang sepenuhnya kepada defendan-defendan; (iii) PK telah gagal untuk mempertimbangkan kewajipan berjaga-jaga defendan dan pelanggarannya; dan (iv) PK telah gagal mempertimbangkan kausa tindakan di bawah pelanggaran kontrak berhubungan dengan defendan kedua.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) PK gagal mengambil kira sama ada defendan mempunyai tugas kewajipan berjaga-jaga terhadap plaintif. Adalah matan bahawa selain daripada elemen kebolehramalan kerosakan, ia juga menjadi satu keperluan untuk mempertimbangkan persoalan 'keterhampiran' atau 'kejiranan' di antara pihak-pihak yang terlibat, dan persoalan sama ada ia adalah adil , saksama dan munasabah untuk mengenakan kewajipan berjaga-jaga dalam keadaan tersebut. Kerosakan dalam kes ini boleh diramalkan. Fakta bahawa defendan pertama mempunyai kawalan ke atas segala penyeliaan projek disahkan oleh saksi defendan pertama yang menyatakan bahawa JKR adalah pihak tunggal yang bertanggungjawab bagi penyeliaan kerja-kerja projek itu.

(2) Defendan pertama mempunyai tugas berjaga-berjaga yang tidak boleh diwakilkan bagi memastikan kerja-kerja projek tidak akan menjejaskan pihak ketiga. Dalam melaksanakan tugasnya, defendan pertama berkewajipan mengambil semua langkah yang perlu; dalam konteks kes ini, untuk memperolehi maklumat yang memadai berkenaan tapak projek dan bahaya yang mungkin timbul seperti kewujudan kabel-kabel bawah tanah. Selanjutnya, ss. 7(2) dan (3) Akta Prosiding Kerajaan 1956 membenarkan tuntutan dibawa terhadap defendan pertama untuk kecuaian.

(3) Di bawah kontrak pembekalan, plaintif bergantung kepada defendan kedua untuk mendapat bekalan elektrik yang konsisten ke kilangnya untuk membuat batu bata. Defendan kedua harus memiliki maklumat kedudukan kabel-kabel elektrik, di bawah tanah atau di atas tanah dalam suatu kawasan tertentu, termasuk tapak projek. Defendan kedua telah diberi notifikasi oleh JKR bahawa kerja-kerja projek akan dilaksanakan di tapak projek. Tiga keping surat bertarikh 31 Oktober 1997, 9 Januari 1998 dan 27 Februari 1998 telah dihantar oleh JKR kepada defendan kedua meminta mereka menanggalkan atau menempatkan semula kabel-kabel atau tiang-tiang elektrik di sekitar tapak projek itu. Tiada

keterangan yang menunjukkan sama ada apabila diberi notifikasi tersebut, defendan kedua telah mengambil tindakan untuk mematuhi permintaan JKR. Oleh itu, secara munasabah ia boleh dijangkakan bahawa kerja-kerja projek boleh mengakibatkan kerosakan kepada kabel-kabel yang dimiliki defendan kedua dan apa-apa kerosakan berkaitan yang berlaku adalah juga secara munasabah boleh dijangkakan.

(4) Sama ada punca kerosakan peralatan plaintif adalah disebabkan oleh pusuan atau berlakunya voltan rendah adalah satu persoalan yang serius di antara plaintif dan defendan kedua. Saksi pakar plaintif, PW4 dan PW8, berpendapat bahawa pusuan telah berlaku disebabkan fana volten yang teruk akibat pintasan seketika yang telah menyebabkan fius-fius di pencawang meletup. Saksi pakar untuk defendan kedua (DW5 dan DW7) berpendapat bahawa kerosakan kepada peralatan plaintif disebabkan voltan rendah di mana arus tinggi mengalir kepada peralatan-peralatan dan telah merosakkannya. Jika PK telah menilai pendapat-pendapat yang berbeza itu, beliau akan mempunyai alasan untuk menolak pendapat DW5. Pertama sekali, PW8 memperjelaskan kenapa kejadian itu tidak berlaku akibat voltan rendah; DW5 gagal memperjelaskannya. Juga, dasar pendapat DW5 adalah diragui dengan merujuk kepada kaedahnya dan fakta bahawa pembawa fius telah 'terbakar hangus' tidak diperjelaskan secukupnya walaupun telah dicabar. Pendapat saksi pakar plaintif tidak berganjak semasa pemeriksaan balas, dan pendapat mereka juga tidak dicemarkan. Oleh itu, pendapat saksi- saksi plaintif harus diterima.

(5) Plaintif telah memasang langkah-langkah perlindungan terhadap kekurangan voltan. Plaintif telah memasang sistem relay dan juga beban haba atas peralatan. Walaupun langkah-langkah perlindungan telah dilakukan, peralatan plaintif masih mengalami kerosakan akibat kejadian itu. Ini jelas melemahkan hujahan defendan kedua bahawa kejadian itu telah menyebabkan kekurangan voltan. Punca kejadian itu jelasnya adalah pusuan. Pengguna-pengguna tidak boleh dijangka melindungi diri mereka daripada pencerobohan voltan tinggi dan tidak perlu meletakkan penangkap pusuan di setiap peralatan. Tanggungjawab untuk mencipta satu perlindungan diletakkan pada sumber pusuan voltan yang berlebihan, iaitu, pemilik transformer defendan kedua. Kerosakan boleh dielakkan jika defendan kedua telah meletakkan penangkap pusuan di terminal pengagihan transformer untuk menangkap pusuan pada sumbernya. Plaintif telah meletakkan sistem perlindungan untuk melindungi daripada voltan yang terkurang iaitu satu keperluan yang wajib. Dengan itu, persoalan sama ada plaintif telah menyumbang cuai tidak timbul.

(6) Selain daripada kegagalan defendan kedua untuk bertindak keatas tiga surat daripada defendan pertama bagi penanggalan kabel di tapak projek, ia adalah jelas bahawa defendan kedua juga gagal untuk mengekalkan

penanda kabel yang boleh dilihat. Penanda yang jelas boleh dilihat, menurut DW2, adalah penanda kepingan yang berada di bawah tanah dan adalah untuk melindungi kabel; jika kerja pelambakan dilaksanakan, pekerja-pekerja tidak akan sedar bahawa terdapat penanda kepingan dalam kawasan itu. Dengan itu, defendan kedua sepatutnya memaklumkan kepada JKR kedudukan kabel tanpa apa-apa permintaan khusus (*Lembaga Letrik Negara Malaysia v. Ramakrishnan*).

(7) Defendan kedua di bawah obligasi berkontrak untuk memastikan bekalan elektrik yang berterusan dan tanpa gangguan kepada plaintif di bawah kontrak pembekalan. Pengetahuan berkenaan kedudukan kabel sepatutnya berada dalam milikan defendan kedua. Defendan kedua tidak memaklumkan kepada defendan pertama berkenaan kedudukan kabel-kabel di tapak projek. Sebagai pembekal utama elektrik, defendan kedua sepatutnya bertindak balas dengan gigih dan tekun kepada surat defendan pertama. Kegagalan menyediakan butir-butiran kabel kepada defendan pertama bukan sahaja satu tindakan yang cuai; tetapi ia adalah satu perbuatan peninggalan yang tidak bertanggungjawab. Defendan kedua juga gagal untuk meletakkan satu skim perlindungan untuk melindungi pengguna-pengguna daripada pusuan. Jika terdapat skim perlindungan pusuan, berkemungkinan peralatan plaintif tidak akan mengalami kerosakan tersebut.

Case(s) referred to:

Berjaya Sompo Insurance Berhad v. Nilai-3 Porcelain Inn Sdn Bhd (Civil Appeal No. W-02(NCC)(W)-1533-07/2013) (Unreported) ***(refd)***

Caparo Industries Plc v. Dickman [1990] 2 AV 605 (HL) ***(refd)***

Datuk Bandar Dewan Bandaraya Kuala Lumpur v. Ong Kok Peng & Anor [1993] 3 CLJ 205 SC ***(refd)***

Jaswant Singh v. Central Electricity Board & Anor [1967] 1 LNS 62 HC ***(refd)***

Junaidi Abdullah v. Public Prosecutor [1993] 4 CLJ 201 SC ***(refd)***

Lembaga Letrik Negara, Malaysia v. D Ramakrishnan [1982] CLJ 401; [1982] CLJ (Rep) 159 FC ***(refd)***

Lim Teck Kong v. Dr Abdul Hamid Abdul Rashid & Anor [2006] 1 CLJ 391 CA ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

Mohamed Ismail Mohamed Shariff v. Zain Azahari Zainal Abidin & Ors [2013] 2 CLJ 717 FC ***(refd)***

National Justice Compania Naviera SA v. Prudential Assurance Co Ltd ("The Ikarian Reefer") [1993] 2 Llyod's Rep 68 ***(refd)***

National Justice Compania Naviera SA v. Prudential Assurance Co Ltd ("The Ikarian Reefer") [1995] 1 All ER 577 ***(refd)***

SCM (United Kingdom) Ltd v. WJ Whittall & Son Ltd [1971] 1 QB 337 ***(refd)***

Legislation referred to:

Electricity Regulations 1994, reg. 110(1)

Evidence Act 1950, s. 45(1)

Government Proceedings Act 1956, ss. 4, 5, 6(1), (4), 7(2), (3)

Rules of Court 2012, O. 40A r. 2

For the appellant - Malik Imtiaz Sarwar (Yusfarizal Yussoff, Mohammad Zaid Daud & Mohd Munzeer Zainul Abidin with him); M/s Zulpadli & Edham
For the 1st respondent - Nik Mohd Noor Nik Kar (Nurhafizza Azizan SFC & Norazalina Razali FC with him); AG's Chambers
For the 2nd respondent - Nadzarin Wok Nordin (Suzalina Salleh, Norhani Nordin & Sharlene Jenisha with him); M/s Nadzarin Kuok Puthucheary & Tan

[Appeal from High Court, Ipoh; Suit No: 21-29 of 1999]

Reported by Suhainah Wahiduddin

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] This appeal is against the decision of the learned Judicial Commissioner (JC) of the High Court dismissing the appellant's claim for damages against the first and second respondents for negligence and for breach of contract against the second respondent. For convenience, the parties shall be referred to as they were in the High Court.

[2] We heard the appeal on 11 March 2015. After hearing the parties, we adjourned the matter for our consideration and decision. We now deliver our decision and the reasons for the same.

Background Facts

[3] The plaintiff operates a factory in Tanjong Malim, Perak producing calcium silicate bricks.

[4] Pursuant to a supply of electricity contract dated 1 March 1996 ("the supply contract"), the second defendant Tenaga Nasional Berhad supplied electricity to the plaintiff. Prior to the supply contract, as required by the second defendant the plaintiff constructed a power substation which housed the plaintiff's switch gear and relay systems, which functioned as a protection system against internal fault.

[5] On or about 13 October 1997, Jabatan Kerja Raya ("JKR"), under the control of the first defendant, embarked on constructing a rest and recreation area ("the project") on the Ipoh-Kuala Lumpur highway ("the project site"). The first defendant appointed Markas Perdana Sdn Bhd ("the contractor") to execute the project works.

[6] On 5 August 1998, the contractor whilst carrying out the project works at the project site struck an 11kV underground cable ("the cable") belonging to the second defendant ("the incident"). The cable was connected to the plaintiff's factory via a switching station. The cable was damaged,

interrupting the supply of electricity to the plaintiff's factory. Consequently, the operations in the plaintiff's factory ceased and the plaintiff's equipment were damaged ("the damage").

[7] Prior to the incident, the first defendant had written three letters dated 31 October 1997, 9 January 1998 and 27 February 1998 respectively to the second defendant requesting for all cables along the project site to be removed so that work carried on the site can be done without hindrance or interruption. There is no evidence whether, having been notified of the same by the first defendant, that the second defendant proceeded to take the necessary steps to comply with the requests made by the first defendant. Neither did the first defendant follow up with the second defendant on the matter.

Decision Of The High Court

[8] At the trial of the action, the primary issue was whether the damage was caused by the incident. Both parties called their own experts to assist the trial court in determining the issue.

[9] On 24 December 2012, the learned JC dismissed the plaintiff's claim on three main grounds:

(i) There was no evidence from the plaintiff to show that there was a protective scheme set up to protect the machines;

(ii) There was no duty of care and breach of duty on the part of the second defendant; and

(iii) Even if there was such a duty and breach of duty on the part of the second defendant, the plaintiff's contributory negligence was absolute.

Plaintiff's Submission

[10] Before us, learned counsel for the plaintiff argued that according to the plaintiff's expert witnesses (PW4 and PW8) the damage to the plaintiff's equipment was caused by a surge which was attributable to a "severe voltage transient" caused by a momentary shorting that in turn caused the fuses at the sub-station to have exploded. On the other hand, the second defendant's expert witnesses DW5 and DW7 opined that the damage was caused by under-voltage. DW5 said that the damage was not caused by a "voltage surge" or "power surge". DW7 opined that based on the report by PW4, he concluded that the damage was caused by an under-voltage.

[11] Without evaluating the competing views the learned JC went on to conclude that the incident had caused an under-voltage. In so doing, the learned JC had accepted wholly the evidence of DW5 and DW7. This was an error as the learned JC was obliged to evaluate the opinions of all the experts. Had the learned JC done so, Her Ladyship would have found there

to be reason to discount the opinion of DW5 (judgment of the Court of Appeal in Civil Appeal No. W-02(NCC)(W)-1533-07/2013; *Berjaya Sompo Insurance Berhad v. Nilai-3 Porcelain Inn Sdn Bhd* referred).

[12] Secondly, learned counsel argued that the duty of care owed by the second defendant is a high duty of care of an electricity supplier (*Lembaga Letrik Negara, Malaysia v. D Ramakrishnan* [1982] CLJ 401; [1982] CLJ (Rep) 159; [1982] 2 MLJ 128 (FC)). The first defendant owed a non-delegable duty of care which remained with the first defendant at all material times (*Datuk Bandar Dewan Bandaraya Kuala Lumpur v. Ong Kok Peng & Anor* [1993] 3 CLJ 205 (SC)). The first defendant's contractors were negligent in damaging the cable (*SCM (United Kingdom) Ltd v. WJ Whittall & Son Ltd* [1971] 1 QB 337 (CA)).

[13] Thirdly, it was argued that there was no under-voltage; the evidence shows that there was a surge.

[14] Apart from the aforesaid points taken up orally at the appeal, learned counsel also relied on the written submission wherein it is argued that there were four misdirections on the part of the learned JC. Briefly, they are:

(i) The learned JC had only looked at one aspect of the case, ie, the alleged non-installation of the protective system by the plaintiff;

(ii) The learned JC found that the plaintiff's absolute contributory negligence served as a complete defence to the defendants;

(iii) The learned JC failed to consider the defendants' duty of care and breach of the same; and

(iv) The learned JC failed to consider the plaintiff's cause of action under breach of contract in relation to the second defendant.

Decision Of The Court Of Appeal

[15] As a starting point, it must be accepted that on the uncontroverted facts the contractor was negligent in damaging the cable and that they ought reasonably to have foreseen that, if they damaged the cable, the supply of electricity to the factories would likely to be interfered with and the occupiers such as the plaintiff, would be likely to suffer loss and damages, including injury to their property (see *SCM (United Kingdom) Ltd v. WJ Whittall & Son Ltd* (*supra*) at p. 341).

Whether The Defendants Owed The Plaintiff A Duty Of Care?

[16] In the circumstances, is there a duty of care owed by the defendants to the plaintiff?

[17] For the first defendant, it was argued by learned Senior Federal Counsel (SFC) that the contractor was an independent contractor. Therefore, the contractor's workmen do not fall under s. 6(1) and 6(4) of the Government Proceedings Act 1956 and the first defendant cannot be held

vicariously liable for the negligence of the contractor's workmen. Further, the first defendant is not liable for any neglect committed by any public officer who is not named in the proceedings (ss. 4 and 5 of the Government Proceedings Act 1956).

[18] For the second defendant, learned counsel argued that the learned JC had made a finding of fact that the second defendant did not owe any duty of care to the plaintiff on the basis that – (i) the cable which was severed by the contractor was outside the project and project site area; and (ii) the second defendant was never informed of any underground or piling works to be done.

[19] We agree with the submission of learned counsel for the plaintiff that the learned JC failed to consider whether the defendants owed the plaintiff a duty of care in the first place. It is quite settled that apart from the element of the foreseeability of damage, it is also necessary to consider: (i) the question of 'proximity' or 'neighbourhood' between the parties, and (ii) the question of whether it is fair, just and reasonable to impose a duty of care in the circumstances (see *Caparo Industries Plc v. Dickman* [1990] 2 AV 605 (HL); *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1 (FC)).

[20] As adverted to above, in all the circumstances the damage was foreseeable. The fact that the first defendant had control over the supervision of the project works was confirmed by the first defendant's witness (DW1) who said that JKR was the sole party responsible for the supervision of the project works. Further, JKR had requested the second defendant to relocate the cable on the project site so that the cable would not interfere with the project works (JKR's letter dated 31 October 1997 to second defendant).

[21] The principle that a non-delegable duty of care is an exception to the rule that an employer is not liable for the negligence of an independent contractor has been enunciated by the Supreme Court in *Datuk Bandar Dewan Bandaraya Kuala Lumpur v. Ong Kok Peng & Anor* [1993] 3 CLJ 205 (SC) where Peh Swee Chin SCJ said at p. 208:

> If the independent Contractor, that is, the third party in this case was not involved, then there could not be the slightest doubt that the Datuk Bandar, i.e. the defendant was liable. However, it was repeatedly submitted that the defendant was not liable for default or negligence of his independent contractor whom the defendant chose and whose competence was not disputed by any party. Could therefore the blame for the plaintiff's misfortune be shifted on to the shoulders of the defendant's independent contractor in the circumstances of this case?
>
> *While the rule that an employer of an independent contractor is not liable for the default or negligence of such contractor no doubt exists, there are exceptions*, and it is outside the province of this judgment to elaborate all the exceptions but only briefly to deal with them except those which are directly concerned with the instant case.

> First exception is where an employer has not exercised care in selecting a competent contractor as was much pressed in argument in the present case. *Second exception is a group of cases or situations when the duty to take care is said to be "non-delegable". A non-delegable duty to take care means in effect that the employer would have to see to it that such duty of care is exercised, whether by his contractor or not, otherwise he would be equally liable as the contractor, in addition, in most cases, the liability of the contractor*. Such non-delegable duty exists in the case of work causing withdrawal of support to neighbour's land, see *Bower v. Peat* [1876] 1 QBD 321; **work done on a highway**, see *Tarry v. Ashton* [1876] 1 QBD 314; cases of a master's duties for his servant's safety at common law, see *Wilsons & Clyde Coal Co v. English* [1930] AC 57; cases of strict liability and finally cases of statutory duty imposed on certain categories of persons. (emphasis added)

[22] Accordingly, we are constrained to hold that the first defendant owed a non-delegable duty of care to ensure that the project works done would not injure third parties. And in the discharge of that duty, the first defendant is obliged to take all necessary precautions; in the context of the present case, to obtain sufficient information on the project site and the potential hazards such as the existence of underground cables. Further, we are in agreement with learned counsel for the plaintiff that sub-ss. 7(2) and (3) of the Government Proceedings Act 1956 allow for a claim to be brought against the first defendant for negligence.

[23] As for the second defendant, it must have been within its contemplation that under the supply contract the plaintiff was reliant on the second defendant for a consistent supply of electricity to its factory for the purposes of manufacturing bricks. The second defendant must have possession of information of the position of all its electrical cables, underground and aboveground within a particular area, including the project site. The second defendant had been notified by JKR that the project works would be carried out on the project site. In fact, three letters dated 31 October 1997, 9 January 1998 and 27 February 1998 respectively were sent by JKR to the second defendant asking them to remove and or to relocate the electrical cable and or poles in the vicinity of the project site. There is no evidence to indicate whether having been notified of the same, the second defendant took any action to comply with JKR's requests. Accordingly, it was reasonably foreseeable that the project works could cause damage to the cables belonging to the second defendant and that any corresponding damage flowing therefrom was also reasonably foreseeable.

[24] Due to the nature of the supply contract and bearing in mind the dangerous nature of electricity, not only must great care be taken when dealing with electricity (see *Jaswant Singh v. Central Electricity Board & Anor* [1967] 1 LNS 62; [1967] 1 MLJ 272). Further, the Federal Court in *Lembaga Letrik Negara, Malaysia v. D Ramakrishnan* (*supra*) recognised that a higher standard of care was expected of those controlling electricity. At p. 162 (CLJ); p. 130 (MLJ) Raja Azlan Shah CJ (as HRH then was) said:

A The other category forms part of the general law of negligence based on the *Donoghue v. Stevenson* (*supra*) principle and relates to the duty of exercising a high standard of care falling on those controlling an extremely dangerous entity, such as electricity of a lethal voltage.

Whether The Defendants Breached Their Duty Of Care To The Plaintiff? If So,
B *Was The Plaintiff Guilty Of Contributory Negligence?*

[25] In order to determine the issue of breach of duty of care, it is necessary to appreciate the background to the incident.

[26] In the first place, the damage to the cable resulted in the interruption
C of electricity supply to the plaintiff's factory. The damage to the cable caused the damage to the plaintiff's equipment. This fact is corroborated by the second defendant's internal report of the investigation into the cause of the damage to the plaintiff's equipment which concluded that the damage was caused by cable being struck by the contractor. The second defendant's findings were communicated to the plaintiff by a letter dated 17 August 1998.
D

[27] As to whether the cause of the damage to the plaintiff's equipment was due to a surge or an under-voltage is a matter of serious contention between the plaintiff and the second defendant.

[28] The plaintiff's first expert witness En Azhar bin Omar (PW4) is a
E Pengarah Kanan, Jabatan Kawal Selia Pembekalan dan Pasaran Elektrik, Suruhanjaya Tenaga. PW4 is an electrical and electronics graduate and is a registered professional engineer with 27 years in the electricity supply industry. PW4 said that a surge occurred with the result that the plaintiff's equipment was burnt out. The surge was due to a "severe voltage transient"
F otherwise known as "spikes" or "surges" caused by a momentary shorting that in turn caused the fuses at the sub-station to have exploded.

[29] The plaintiff's second expert witness IR Liew Meng Chee (PW8) is a consultant electrical engineer with 45 years of experience. PW8 concurred with PW4's findings that the plaintiff's equipment was damaged by the
G transient overvoltage surges at the time of the incident. In PW8's opinion, the damage to the cable resulted in a high fault current to flow through the 22/11KV transformer at the sub-station causing the fuses in the 22KV line supplying the transformer to blow. The blowing of the fuses led to the sudden collapse of high fault current in the transformer to zero which resulted in
H overvoltage surges being induced into the transformer 22KV windings which were connected to the 22KV feeder line supplying the plaintiff's factory. The overvoltage surges were transmitted to the plaintiff's equipment at the factory and broke down the insulation of its electrical equipment that was rated for low voltage operations. The blowing of two of the three phase supply system
I also caused virtually interruption of power supply to the plaintiff's factory resulting in total stoppage to factory operations.

[30] The second defendant's first expert witness Professor Khalid bin Mohamed Nor (DW5) is attached to the Faculty of Engineering at University Technology Malaysia. DW5 opined that there was no voltage surge or power surge to the plaintiff's factory. DW5 based his finding on a laporan kejadian which showed that there was no damage as a result of "haba" such as the fuse reacting, equipment burnt in the plaintiff's factory.

[31] The second defendant's second expert witness Dr Mohamed Fau'ad bin Faisal (DW7) is a PhD holder in Electrical Engineering from UKM and a Master in Electrical Engineering from UiTM and a Bachelor of Science in Electrical Engineering from Case Western Reserve University in Cleveland Ohio, USA. DW7 is a technical expert in power quality and energy efficiency with TNB Distribution. According to DW7, the damage to the plaintiff's equipment was caused by under-voltage where high current flows to the machineries damaged the equipment.

Expert Evidence

[32] On the facts of this particular case, the key technical issues that arose for determination are as follows:

(i) Whether the damage to the plaintiff's equipment was caused by a surge attributable to a "severe voltage transient" caused by a momentary shorting that in turn caused the fuses at the sub-station to have exploded as contended by the plaintiff or by under-voltage as contended by the second defendant?

(ii) Whether the plaintiff had the relevant protective system in place so as to safeguard themselves from the damage?

[33] Apart from the field of law the court itself has no other expertise. For that reason, in cases involving technical, scientific or medical issues which require specialised knowledge such as forgery, intellectual property, medical negligence and other like cases the court frequently has to rely on the evidence of experts. As such, this is a case in which the court has no expertise. Therefore, the evidence of an expert is called upon to assist the court in arriving at a correct decision.

[34] In our considered view, the key issues in this case are highly technical and require experts with proper qualifications and an in-depth and specialised knowledge and experience in the field of electrical power installations, power equipment reliability condition assessment, electrical system disturbance/faulty investigation, system protection coordination analysis and investigation and analysis of power equipment breakdown and preventive measures.

[35] In this case a number of experts were called by the parties for the purpose of obtaining their professional assistance and with the intention of relying on their evidence. It is the primary duty of an expert to assist the

court in arriving at the right decision; even if he compromises the case of the party who called him and is paying for his services. It cannot be overemphasized that this duty overrides any obligation to the party from whom the expert has received instructions or by whom he is paid (O. 40A r. 2 of the Rules of Court 2012). Therefore, the evidence of an expert should not only be independent but should also be seen to be independent. It is pertinent to add that the opinions of experts are relevant facts only insofar as they can assist the court in forming an opinion upon the issues in this case (s. 45(1) of the Evidence Act 1950).

[36] What are the duties and responsibilities of expert witnesses? It is useful to consider what Ian Freckelton and Hugh Selby the authors of *Expert Evidence – Law, Practice, Procedure and Advocacy* (Lawbook Co. 2005 3rd edn) described as the most important enunciation of the duties and responsibilities of expert witnesses in the context of *National Justice Compania Naviera SA v. Prudential Assurance Co Ltd ("The Ikarian Reefer")* [1993] 2 Llyod's Rep 68 at pp. 81-82 which has since been applied in *National Justice Compania Naviera SA v. Prudential Assurance Co Ltd ("The Ikarian Reefer")* [1995] 1 All ER 577 at p. 60:

> The duties and responsibilities of expert witnesses in civil cases include the following:
>
> (1) Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or to content by the exigencies of litigation (*Whitehouse v. Jordan* [1981] 1 WLR 246 at 256-257; 1 All ER 267 at 276 per Lord Wilberforce).
>
> (2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd v. Commercial Union Assurance Co Plc* [1987] 1 Llyod's Rep 379 at 386 per Garland J and *Re J* [1991] FCR 193 per Cazalet J). An expert witness in the High Court should never assume the role of an advocate.
>
> (3) An expert witness should state the facts or assumptions upon which his conclusions are based. He should not omit to consider material facts which could detract from his concluded opinion (*Re J*).
>
> (4) An expert witness should make it clear when a particular question or issue falls outside his expertise.
>
> (5) If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (*Re J*). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, the qualification should be stated in the report (*Derby & Co Ltd v. Weldon* (1990) Times, 9 November per Staughton LJ).

(6) If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and where appropriate to the court.

[37] As an independent aid to the court, it is therefore essential that an expert witness must possess and retain a standard of absolute personal integrity. In this connection, Cazalet J in *Re J*, *supra* said:

> Expert witnesses are in a privileged position: indeed only experts are permitted to give an opinion in evidence. Outside the legal field the court itself has no expertise and for that reason frequently has to rely on the evidence of experts. Such experts must express only opinions which they genuinely hold and which are not biased in favour of one particular party. Opinions can, of course, differ and indeed quite frequently experts who have expressed their objective and honest opinion will differ, but such differences are usually within a legitimate area of disagreement. On occasions, and because they are acting on opposing sides, each may give his opinion from different basic facts. This of itself is likely to produce a divergence.

[38] Before the court can accept the testimony of the expert the competency of the expert witness must be established. In *Junaidi bin Abdullah v. Public Prosecutor* [1993] 4 CLJ 201; [1993] 3 MLJ 217 (SC), the Supreme Court made the following observations:

> First, does the nature if the evidence require special skill? Second, if so, has the witness acquired the necessary skill either by academic qualification or experience so that he has adequate knowledge to express an opinion on the matter under enquiry? The answer to both questions must necessarily depend on the facts of each particular case. The speciality of the skill required of an expert witness under s. 45 would depend on the scientific nature and complexity of the evidence sought to be proved. The more scientific and complex the subject matter, the more extensive and deeper will be the court required to enquire into the ascertainment of his qualification or experience in the particular field of art, trade or profession. But in the final analysis in a non-jury trial, it is for the trial judge himself as both judge of fact and law to determine the weight to be attached to such evidence notwithstanding the outstanding qualification or experience (or lack of it) of the expert.

[39] We shall now address the first issue raised by the plaintiff relating to the learned JC's failure to evaluate the competing views of the experts.

[40] In our view, when expert opinions are in conflict with one another the court is obliged to assess the evidence and accept if necessary the most reliable parts in forming its decision (see *Mohamed Ismail Mohamed Shariff v. Zain Azahari Zainal Abidin & Ors* [2013] 2 CLJ 717; [2013] 2 MLJ 605). In that process the court may put relevant questions to the expert for the

purposes of clarification or eliciting further information (see *Lim Teck Kong v. Dr Abdul Hamid Abdul Rashid & Anor* [2006] 1 CLJ 391; [2006] 3 MLJ 213).

[41] In the grounds of judgment the learned JC referred to the evidence of PW8, DW5 and DW7. The evidence of PW4 was not referred to by the learned JC. Further, there is nothing in the grounds of judgment to indicate that the learned JC preferred the evidence of the defendant's experts and if so, the reasons therefor. The concluding paragraph of the grounds of judgment bears reproducing:

> (9) After having considered and evaluated the evidence in totality and the submissions of all the parties to this suit, I was compelled to dismiss the plaintiff's case without much ado. Despite the painstaking perusal and consideration of the voluminous transcript (*sic*) and the well prepared written submissions, it was stark to me that ultimately one issue would make a speedy and instant disposal of the case without even having to delve on the other issues ventilated. SP2 (Chia Soon Hua, the managing director of the plaintiff) merely testified that the factory machines had ordinary protection installed without further elaboration. With reference to the witness statement (PSP2) of SP2, the purchase price or the costs of purchasing and installing the factory production lines totalled almost RM36.3 million i.e. almost RM1.9 million for the boiler, RM2.4 million for six units of autoclave, RM23 million for the mixing plant and hydraulic press BSP 600 and RM9 million for the second BSP 600. There was no evidence from the plaintiff to show in any manner that there was a protective scheme set up to protect these very costly state-of-the-art machines imported from Germany (the mixer and hydraulic presses in particular).
>
> Even if there was a duty of care and breach of duty on the part of the second defendant which I found there was none based on the facts and circumstances, the omission by the plaintiff to install a comprehensive and credible protection system for these electronically controlled and hence highly sensitive machinery against any foreseeable electrical breakdown or faults which would include over voltage and under voltage, in my considered view, had totally cancelled out and annulled any breach on the part of the second defendant. The plaintiff's contributory negligence from this aspect was absolute in the sense that their machines were electronically sensitive and by this very nature highly susceptible to any electrical fault or breakdown. SP2 (Abdul Bari bin Wook) testified that "the machine is highly technologically advanced and sensitive, a slight fault in the sensor or mechanical motor or other hydraulic or pneumatic system will certainly disrupt the quality of production. This slight fault cannot be easily determined even after a thorough inspection". This evidence underscored the highly sensitive machines.
>
> Based on the evidence adduced, the second defendant was not informed of piling works where the underground cable ran. Secondly, there was no evidence that the construction site extended to where the underground cable was located in the middle of the road.

> I consequently found that the losses purportedly suffered by the plaintiff arose consequent from the plaintiff's direct failure and omission to provide a credible form of protective system for its production lines from the time they were set up. The plaintiff owed itself the innate duty to ensure that their state-of-the-art and highly sensitive machines and presses were fully protected and insured against any electrical breakdown and failure which was highly foreseeable, whatever the cause for them. This negligence and breach had to be ruled in favour of the first and second defendants.
>
> Nevertheless I ordered costs to be borne by each party in view of the facts and circumstances peculiar to this case in the light that the plaintiff suffered undeniably tremendous damage and losses by the unfortunate event of 5.8.1998.

[42] Whilst the grounds of judgment contained a summary of the evidence of PW8, DW5 and DW7, we are constrained to find that the learned JC erred in failing to conduct any assessment of the conflicting evidence of the experts.

[43] Without evaluating the opinions of the experts, the learned JC went on to make a finding that the incident had caused an under-voltage. The learned JC also held that the determinant factor in the case was the non-installation of a protective system by the plaintiff which "cancelled out and annulled any breach on the part of the second defendant". Learned counsel for the plaintiff argued that in concluding as such, the learned JC accepted wholly the evidence of DW5 and DW7. Had the learned JC not done so, she would have found there to be reason to discount the opinion of DW5.

[44] Learned counsel for the plaintiff also argued that the learned JC erred in concluding that there was no protection in place against under-voltage. This was not relevant in view of the surge. In fact there was a relay system in place installed by the plaintiff.

[45] Learned counsel for the second defendant argued that the plaintiff's case was in fact premised on an over-voltage incident has been proven to be a fallacy because PW2 the plaintiff's business director testified that the machines were damaged because of over-voltage. The plaintiff's allegation at the trial and in their submission that the incident caused a severe voltage transient is also not their pleaded case.

[46] Learned counsel for the second defendant also argued that the plaintiff was the author of its own misfortune by failing to provide a protection scheme in accordance with internationally recognised standards and regulations.

[47] We do not agree with the second defendant's contention that the plaintiff's evidence is inconsistent with the pleaded case that the incident caused a power shortage and/or power surge and/or massive voltage surge at the plaintiff's premises. The plaintiff's experts explained that the surge was

attributable to a severe voltage transient caused by a momentary shorting which in turn caused the fuses at the sub-station to have exploded. The plaintiffs' experts' view that the severe voltage transient was identified as the cause of the surge actually supports the plaintiff's case that the incident caused a power surge to occur at the plaintiff's premises.

[48] We agree with the plaintiff's argument that had the learned JC evaluated the competing views, Her Ladyship would have found there to be reason to discount the opinion of DW5. Firstly, PW8 explained why the incident could not have resulted in an under-voltage; in particular this would not have caused the breakdown of the dropout fuse carrier based on the reports. This event was not explained by DW5. PW8 also showed that the basis of DW5's opinion was doubtful by reference to his methodology and the fact of the fuse carrier being "terbakar hangus" was not adequately explained even though challenged. Secondly, DW5 also stated that under-voltage can be stopped if there is a relay system. However, since the plaintiff had installed a relay system, the fact that there was the damage militates against DW5's opinion that the damage was attributable to under-voltage. Thirdly, DW5 has no on-field experience on fault analysis as compared with PW8. DW5 has no expertise in severe voltage transient, yet he concluded that transient cannot go through a transformer, contradicting himself with various international articles. We also note that DW5 is not an independent expert as he received monetary grant from the second defendant and was appointed as a consultant for TNB Research Team.

[49] DW7 was an employee of the second defendant. Under cross-examination, DW7 was evasive on the topic of under-voltage protection. Initially, DW7 said that under-voltage protection is mandatory and that Suruhanjaya Tenaga would take action against a party for failure to install such protection. However, DW7 retracted his statement after he was informed that the Suruhanjaya Tenaga did not compound the plaintiff for the incident. DW7 also contradicted DW5's opinion when he said that transient can travel through the transformer coupling. On the whole, we do not think that DW7 is an independent or reliable witness and whose opinion was uninfluenced by the exigencies of litigation. Accordingly, DW7's evidence should be discounted.

[50] In contrast, the plaintiff's experts' views did not shift under cross-examination, nor were their views discredited, unlike that of DW5. In the circumstances, we agree with learned counsel for the plaintiff that the views of the plaintiff's experts ought to have been accepted. They were wholly plausible having regard to all the circumstances.

[51] We now turn to the question of whether the plaintiff was guilty of contributory negligence. On the evidence, we are satisfied that the plaintiff had protective measures installed for protection against under-voltage. As admitted by DW1 at a meeting held on 12 October 1999 to discuss the damage, plaintiff had installed a relay system as well as the thermal overload

on the equipment. DW7 admitted that the thermal overload was protection against under-voltage. In this connection, it is also pertinent to note DW7's evidence that it is a mandatory requirement for users to put in place protective measures to protect against under-voltage. Even though the protection measures were in place, the plaintiff's equipment was damaged by the incident. This clearly undercuts the second defendant's contention that the incident caused an under-voltage.

[52] As the cause of the incident was clearly a surge, we will proceed to consider the question whether transient faults are normally protected against by users or by the power supplier. In PW8's opinion, consumers cannot be expected to protect against invasion of high voltage. The IEC Standard referred to by the second defendant does not require a consumer to put a surge arrestor at every equipment. The responsibility to devise a protection lays with the source of the over-voltage surge, in this case the owner of the transformer the second defendant. The damage could have been avoided if the second defendant had installed a surge arrestor at the terminals of the distribution transformers to arrest the surge at its source.

[53] We also note that the system in place was installed by the second defendant in the 1980s. It was an old system. DW1 admitted that the second defendant did not upgrade the system in the area up to modern standards; DW1 admitted that such systems are only available in parts of Perak, Johor and north of Penang.

[54] Apart from the second defendant's failure to act on the three letters from the first defendant for the removal of the cables in the project site, it is evident that the second defendant also failed to maintain a visible cable marker. The only marker according to DW2 was a slab marker that was underground and it was to protect the cable; that if piling work was carried out (and not digging works), the workers would not know that there is a slab marker in that area. As such, the second defendant ought to have informed the JKR of the position of the cable without any specific request (*Lembaga Letrik Negara, Malaysia v. D Ramakrishnan* (*supra*)).

[55] We also allude to a significant fact and it is this. The second defendant was compounded by the Suruhanjaya Tenaga under reg. 110(1), Electricity Regulations 1994 for not having taken "langkah awasan munasabah untuk mencegah bahaya" over the incident.

Concluding Remarks

[56] As adverted to in paras. 18 to 21 above, we find that the first defendant owed a non-delegable duty of care to ensure that the project work done would not injure third parties. Due to the nature of the supply contract and the dangerous nature of electricity, the second defendant is under a duty to exercise great care when dealing with electricity, which duty is owed to the plaintiff and third parties.

[57] The first defendant was aware of the possibility of underground cables in the project site and the dangers posed. Accordingly, the first defendant had written three letters to the second defendant asking the second defendant to remove any cables (above and underground) in the project site. The second defendant did not respond to the first defendant's letters. However, the first defendant chose to proceed with the project works which led to the incident. In doing so the first defendant had acted negligently. The first defendant ought to have stopped works pending it being made aware of where the cables were located.

[58] The second defendant was under a contractual obligation to ensure a continuous and uninterrupted supply of electricity to the plaintiff under the supply contract. The knowledge of the location of the cable must have been in the second defendant's possession. For some unknown reason, the second defendant did not inform the first defendant of the location of the cables at the project site. As the principal supplier of electricity, the second defendant ought to have acted diligently in response to the first defendant's letters. The failure to provide the details of the cable to the first defendant was not only negligent; it is an irresponsible act of omission.

[59] For the reasons adverted to above, we find on the balance of probabilities that the incident led to a surge and not an under-voltage as contended by the second defendant. We also find that the second defendant had failed to put in place a protection scheme to protect their users against surge. Whilst such protection schemes already existed in parts of Perak, Johor and north of Penang, this was not the case in the area of Tanjung Malim, Perak. Had there been a surge protection scheme being put in place, it is probable that the damage would not have been caused to the plaintiff's equipment.

[60] We find that the plaintiff had placed a protective system to protect against under-voltage which is a mandatory requirement. As such, the question of whether the plaintiff was contributorily negligent does not arise.

[61] Accordingly, we allow the appeal with costs here and below. Judgment is hereby entered against the first and second defendants. Damages to be assessed by the Deputy Registrar of the High Court. Deposit to be refunded to plaintiff.